ASSOCIATION OF AMERICAN UNIVERSITIES

October 12, 2005

Defense Acquisitions Regulation Council
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Re: DFARS Case 2004-D010
Defense Federal Acquisition Regulation Supplement;
Export-Controlled Information and Technology

The Association of American Universities (AAU), which represents 60 leading U.S. research universities, appreciates the opportunity to comment on the Notice of Proposed Rulemaking (NPRM) to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to address requirements for preventing unauthorized disclosure of export-controlled information and technology under DOD contracts (DFARS Case 2004-D010).

Together, AAU's research universities constitute an exceptional national resource, conducting over half of all federally sponsored university-based research. In total they receive approximately 60 percent of all DOD research funds awarded to universities, an amount exceeding $1.2 billion. A large percentage of these DOD funds come in the form of contracts and subcontracts as opposed to grants. AAU institutions award approximately 17 percent of all U.S. bachelors degrees, 20 percent of masters degrees and more than 50 percent of all doctoral and postdoctoral degrees, many of which are in fields of science and engineering critical to our national defense. Taken together, AAU universities make a unique contribution to the protection and advancement of American national security and economic interests while at the same time fostering goodwill and progress around the globe.

AAU and its members are aware of and fully committed to fulfilling their responsibility to ensure compliance with export control laws and regulations. AAU member institutions understand that export controls are a necessary component of national security policy. AAU universities are committed to complying with applicable export control rules and regulations and have enhanced compliance efforts in recent years. Earlier this year, an informal survey of AAU senior research officers revealed that over the last two years nearly all AAU institutions have taken additional steps to ensure their compliance with existing export control regulations. Typical steps have included: (1) issuing policy statements from the university administration concerning compliance with the export control laws; (2) incorporating training on export controls into standard educational materials provided to campus research administrators and sponsored research directors; (3) undertaking a wide range of outreach activities on campus to ensure that faculty and key researchers understand the nature of export controls and are more aware of their responsibilities; (4) sending university staff to export control seminars and panel discussions; (5) designating specific research administrative staff to be responsible for export control compliance; and (6) hiring outside legal counsel to ensure compliance. These steps and others are contributing to a culture of compliance across university campuses.

The DOD proposal essentially would implement recommendations by the DOD Inspector General (IG) that are contained in that office's March 25, 2004 report entitled, "Export-Controlled Technology and Contractor, University, and Federally Funded Research and Development Center Facilities" (D-20040061). The proposed rule calls for adding a clause to DOD contracts where export-controlled information or technologies may be involved. It also mandates compliance plans which include "unique badging requirements for foreign nationals and foreign persons and segregated work areas for export-controlled information and technology."

AAU is concerned that, as written, the clause is overly prescriptive, goes beyond requirements in current export control regulations, and fails to reference the well-established exemption for fundamental research. Moreover, unless the fundamental research exemption is referenced explicitly in the final rule, AAU believes that DOD contracting officers will automatically include the clause in contracts, even where no controlled information is exchanged or where such information would normally be covered by the fundamental research exemption. The inclusion of such a clause in contracts is likely to result in the unwillingness of some universities to perform research on behalf of DOD, an outcome that would harm U.S. national security. Finally, AAU believes that that there is no need to include such an extensive clause in DOD contracts to address the concerns raised by the DOD IG. It is the Association's view that the IG's concerns can be addressed by including a much simpler clause in DOD contracts that merely states that contractors and subcontractors are responsible for ensuring compliance with existing export laws and regulations. Such a clause would avoid the negative consequences of the extensive clause envisioned in the current proposed rule.

Our comments in section I below provide AAU's specific concerns regarding the proposed DFARS Case. Section II outlines three alternative actions that AAU recommends with regard to the NPRM. In sum, AAU urges that DOD issue a second *proposed* rule for further comment and review before moving to a final rule.

I. AAU concerns about the proposed DFARS Case

1) **The rule is premature in light of ongoing consideration by the Department of Commerce's Bureau of Industry and Security (BIS) of changes to export administration regulations.** As the Department is aware, the Department of Commerce is considering possible changes to the Export Administration Regulations (EAR) related to "deemed exports." Given the current uncertainty surrounding such changes, AAU believes the DOD proposed rule is premature. BIS may put forth a reinterpretation of "use technology" as it applies to the fundamental research exemption or may determine that equipment used in the course of fundamental research is not exempt from deemed export control regulations. In either case, these determinations could have a substantial impact on DOD's ability to implement and enforce this proposed rule. For these reasons, AAU urges that further action on the proposed DOD rule be delayed until BIS issues its final rule. Moreover, we encourage DOD to engage actively in discussions with BIS to ensure that DOD's interests in maintaining university-based DOD research are not impeded by the final Commerce rule and any accompanying guidance BIS provides.

2) **The proposed rule would harm U.S. national security by forcing universities to turn down DOD contracts.** The proposed DOD language would require that an onerous clause be inserted in contracts and subcontracts to universities when contracting officers believe that export controlled information or technology *may* be involved. The clause, as currently written, would cause significant confusion among DOD contracting officers and university grants administrators, resulting in protracted contract negotiations over export control provisions, delays in research, and an overly broad application of controls to university-based research.

   Open collaboration and the free exchange of ideas are fundamental to the culture of America's research universities. It is through this culture of openness that U.S. research universities have not only thrived but also served as the fertile ground where innovative and cutting-edge ideas are brought to life. As written, the proposed rule would undermine the open and innovative atmosphere of our research laboratories.

   For that reason, if the proposed export control clause was included in university contracts and subcontracts without significant revisions, many universities would likely reject such contracts. The net effect would be to exclude from much of DOD's critical national security research those universities most qualified to conduct it. This would be an unfortunate result for U.S. universities, DOD, and the nation.

3) **DOD's NPRM fails to reference the well-established Fundamental Research Exemption and National Security Decision Directive 189 (NSDD 189).** Unless the fundamental research exemption is referenced explicitly in the final rule, we believe it is likely that DOD contracting officers will automatically include the clause in contracts, even when no controlled information is exchanged or where such information would normally be exempt under the fundamental research exemption. This will bind universities to comply with the terms of the clause as a matter of contract law, even though the terms of the contract exceed the requirements of existing export control regulations, such as Export Administration Regulations (EAR) and International Traffic in Arms Regulations (ITAR).

   AAU is concerned that contracting officers and their technical assistants are inadequately trained to recognize and exclude the clause when the fundamental research exemption should be applied. In fact, it is our belief that at this time many DOD contracting officers are unaware of the fundamental research exemption and licensing exclusions provided for by EAR and ITAR. We therefore have no reason to believe that they will be in a position to accurately apply the clause only to contracts where export controlled information is involved or when other licensing exemptions should be applied.

   AAU is also concerned about the lack of any explicit reference to NSDD 189. NSDD 189, first approved by President Ronald Reagan in September 1985 and since reaffirmed by the Bush Administration in November 2001, defines fundamental research and states: "It is the policy of this Administration that, to the maximum extent possible, the products of fundamental research remain unrestricted. It is also the policy of this Administration that, where national security requires control, the mechanism for control of information generated during federally funded fundamental research in science, technology and engineering at colleges, universities and laboratories is classification…."

4) **The proposed rule has the potential to cause DOD's own contracting officers to violate existing DOD policy contained in DOD Instruction 5230.27. Sections 4.3.** This instruction states: "The mechanism for control of information generated by DOD-funded contracted fundamental research in science, technology and engineering performed under contract or grant at colleges, universities, and non-government laboratories is security classification. No other type of control is authorized unless required by law**.**" The badging requirements contained in the proposed rule clearly go above what is required by current export control laws and regulations.

5) **The proposed rule's imprecise language is likely to lead contracting officers to include the clause even in contracts where no export controlled information is required.** The proposed rule does not state that a contractor "must" or "shall" have access to export-controlled information or technology to carry out the research requirements of a contract to trigger the inclusion of the

clause in a contract. Rather, the proposed rule requires that DOD contracting officers include the clause if the contractor "may" gain access to export-controlled information or technology. AAU believes the ambiguity of this language would lead contracting officers to include the clause in contracts even in instances where no export-controlled information will be required. The language not only gives DOD contracting officers too much latitude in determining when to add the overly restrictive language to DOD contracts but actually encourages them to do so even when it is not necessary in order to protect themselves from any potential liability or culpability. This would be the case even in instances where no export controlled information or technology would be exchanged or when license exemptions or exclusions from controls would apply.

6) **The proposed export control clause would be included in *subcontracts* even when it should not apply.** The clause is likely to be included in university subcontracts from industry prime contractors even when the university's work would include no transfer of export-controlled information or technology and/or would otherwise be exempt under the fundamental research exemption. The problem of flow-down clauses in subcontracts to universities from industry prime contractors has already been delineated in the joint AAU/COGR analysis of troublesome research clauses (see: http://www.aau.edu/research/Rpt4.8.04.pdf).

7) **The NPRM requires that access control plans include "unique badging requirements for foreign-nationals and foreign persons and segregated work areas for export-controlled information and technology."** This requirement is overly prescriptive and goes beyond requirements contained in EAR and ITAR. Moreover, such segregation of students and work areas is antithetical to the education mission of universities. The need to avoid such segregation is the very reason that most universities do not perform classified research on their campuses.

   The close coupling of research and education at universities and the need to freely exchange the new ideas that flow from scholarly discourse require that access to laboratories and classrooms be unimpeded. Unlike the corporate or national laboratory environment, students play a vital role in the conduct of university-based research. The constant rotation of students and visiting scholars into and out of university laboratories ensures a fresh flow of new ideas and talent, which helps to foster creative, cutting-edge research. Requirements to badge and segregate foreign students would not only impede education and research on university campuses but also discourage foreign students and scholars from coming to U.S. universities. We view this requirement as discriminatory and, frankly, un-American. If this overly prescriptive provision is included in university contracts, many universities are likely to reject those contracts.

8) **The compliance requirements outlined in the NPRM go beyond the requirements of the National Industrial Security Program Operating Manual (NISPOM) for the handling of classified information.** For the handling of classified information, the NISPOM provides for unique badging, segregated work areas or *other appropriate measures*, rather than imposing a blanket badging

and segregation requirement in all instances. AAU is concerned that the proposed rules set export control requirements that are more prescriptive than what DOD requires for the conduct of classified research, or, for that matter, the compliance requirements delineated in existing export control rules contained in EAR and ITAR.

9) **The proposed rule makes no distinction between foreign persons from embargoed and "Anti-Terrorism" (AT) nations and those from other nations.** The proposed rule ignores the fact that export regulations vary for foreign nationals depending on their country of origin and the specific technologies and information to which they have access. Since the proposed rule refers only to "controlled technologies and information" but does not specify the levels of controls required to trigger insertion of the clause in the contract by contracting officers, they would be forced to apply the clause based on the most stringent controls contained in the export regulations. These exist for individuals from embargoed and AT countries. The threshold at which control of information and technology is required for individuals from these countries is much lower than for persons from other countries. Because the proposed DOD clause fails to recognize that the nature of controls applied should vary based on the foreign person's citizenship and the specific technology involved, contracting officers would be forced to apply the clause assuming the most stringent controls for each technology. Thus, the clause would be inserted in contracts even if individuals from embargoed or AT nations were not involved in the work being conducted.

10) **DOD compliance and contracting officers appear to have no legal authority to prescribe institutional compliance programs for export control regulations under EAR and ITAR or to evaluate university compliance with these regulations.** Even if the clause is inserted in contracts, AAU questions the authority of DOD contracting officers to both prescribe and recommend appropriate compliance measures under export control laws. For EAR, this responsibility lies with the Department of Commerce, and for ITAR, this responsibility lies with the Department of State. This raises a question as to whether DOD contracting officers actually have the authority to determine when export controls may or may not apply to a DOD contract and, for that matter, if they should take the lead in trying to make such determinations. At the very least, they should consult with the Departments of State and Commerce before making such determinations.

II. AAU's specific recommendations in response to the proposed rule

In revising the proposed rule, DOD has several available options. Listed below are AAU's recommendations to DOD in order of preference.

1) **AAU urges DOD to reject the DOD IG recommendations.** In light of the adverse consequences they would have upon universities' ability to conduct

DOD-sponsored research vital to our national security, AAU recommends strongly that the Department reject the IG recommendations outright.

2) **DOD should develop a much shorter, simpler clause stating only that the contractor is responsible for complying with existing export control laws and any rules and regulations contained in EAR and ITAR.** It appears that the IG recommended the proposed DOD clause simply to inform contractors of their responsibility to comply with existing export laws and regulations. If that was the IG's intent, then AAU recommends that all DOD contracts include language that does that and nothing more. Such language would simply state that DOD contractors and subcontractors are responsible for ensuring compliance with existing export control laws and regulations in accordance with the EAR and ITAR. Universities should be aware of their responsibilities to comply with export control laws, and they must be responsible for compliance. Export control compliance requirements are clearly delineated in EAR and ITAR, so therefore AAU sees no need for DOD to include in its contracts the very prescriptive clause outlined in the proposed rule.

3) **DOD should accept the language provided by the Council on Governmental Relations (COGR) in its revised version of the DFARS Case.** Should DOD choose not to accept either of the two alternative options above, AAU would then recommend that DOD adopt the rewrite of the rule that has been drafted and submitted by COGR and enclosed as an attachment. AAU fully endorses the COGR language.

   The COGR language addresses AAU's concerns in the following ways:

   a) For the benefit of contracting officers, it clearly underscores the fact that restrictions on the transfer of export-controlled information do not apply if the research is otherwise covered by an applicable exemption or license exception (e.g. the fundamental research exemption);

   b) It ensures that the clause and its accompanying compliance requirements apply only when export information is provided by DOD to contractors in connection with the specific work to be performed as a part of the contract. The clause should not apply more broadly to a contractor's compliance with export controls, or when exclusions from controls or license exemptions specifically apply to the work being performed under the contract;

   c) It requires DOD contracting officers and their respective technical/program officers to determine if controlled information will, in fact, be exchanged or required as a part of a contract and to specify that requirement upfront in funding solicitations, contracts, and other DOD funding mechanisms;

   d) It proposes alternative language that would make the proposed clause more flexible allowing universities to pursue all available compliance options

provided for under existing export controls laws and regulations. Clearly, alternative acceptable compliance mechanisms other than badging and segregation of foreign nationals, as provided for in EAR, ITAR and NISPOM, should be permitted under the clause. It also suggests that when questions arise concerning compliance with export regulations, the agency responsible for compliance be engaged in determining appropriate compliance measures.

e) It specifies to contractors that flow-down language provided for in subcontracts must specifically identify export-controlled information or technology. If controlled information is not required for performance of the subcontract, the clause should be excluded from the subcontract and not be passed on to the subcontractor. Likewise, the COGR language also recognizes that subcontracts should be exempt from the clause when applicable exemptions (e.g. the fundamental research exemption) from controls or license exclusions apply to the subcontracted portion of the contract; and

f) It adds specific language in subparagraph (e) that makes it clear that the contract clause does not change or supersede NSDD 189.

III. Conclusion

In addition to AAU's comments, we are aware that several of our member institutions have submitted their own individual comments in response to the NPRM, as have other higher education associations and scientific societies. These include COGR, the National Association of State Universities and Land Grant Colleges, the American Council on Education, the American Association of Medical Colleges, and the National Academies. We share their concerns and associate ourselves with their statements. As noted above, we find the alternative language contained in the attached rewrite of the proposed rule developed by COGR and referenced in our third recommendation in Section II above to be acceptable. It is not, however, our preferred alternative.

AAU has significant concerns that the proposed rule would harm universities' ability to perform research on behalf of DOD and, thereby, would also do harm to U.S. national security. There is clearly some distance to go to ensure that these issues are resolved. Given the potentially far-reaching impact of the proposed role, rather than moving next to issue a final rule, ***AAU urges DOD to issue a second revised proposed rule for additional comment***. AAU hopes this second proposed rule will take into account and work to accommodate our concerns and recommendations.

Cordially,

Nils Hasselmo
President

Attachment